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International Court of Justice

M- 1246

CLOSING [illegible]

delivered before the

INTERNATIONAL MILITARY TRIBUNAL

at the trial of Hermann Goering et. al.

by

Dr. Heinz F r i t z , Attorney-at-Law,

as defense counsel for the defendant F r i t z s c h e .

July 1946

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Mr. President - Your Honors!

The result of the evidence in the case of Fritzsche is a relatively clear one. Although I am one of the last to plead it cannot be avoided to go into legal problems more closely. Above all these problems arise from the fact that Fritzsche was characterized by the prosecution in a particularly striking manner as an accomplice.

However, at first I must examine what position Fritzsche had in the Propaganda Ministry and what part he played in the German propaganda in general. It is these facts which ought to be conclusive in determining what part he supposedly played in the alleged conspiracy.

At the beginning of the trial Mr. Albrecht submitted as evidence the organizational structure of the government of the Third Reich as of March 1945 in the form of a diagram. Mr. Albrecht admitted himself that Fritzsche's name did not appear in it in the position of one of the main leaders of the Propaganda Ministry. It is true, he added that his importance had been greater than one would be led to think from his position as shown on this diagram. He closed his statement by saying that evidence to this effect would be submitted to the Tribunal [1].

Has this been done and could the hearing of evidence really prove that Fritzsche had greater importance?

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1) German transcript: Page 42

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At the session of 28 February 1946 [1] Sir David Maxwell-Fyfe introduced as evidence a "compilation of the elements of guilt" which in a particularly impressive manner demonstrates in how far the individual defendants are connected with the facts of which they are to be guilty in the opinion of the prosecution. The classification of the individual defendants follows from the table which is attached to this compilation as Appendix A. The Tribunal will have noticed that the defendant Fritzsche is the only one not to appear on this table at all. From this follows that he does not belong to any of the organizations which are to be declared criminal here.

A look at the organizational plan of the Propaganda Ministry which was submitted in Brief E by the prosecution, [2] also shows especially clearly that even in his last position as ministerial director and chief of the broadcasting division he was only one of 12 officials of the same rank. Such a position in itself excludes a priori the assumption that he could have determined the policy, the principles of news presentation, and the principles of principles of what may or may not become known to Germany and the world. It is true Captain Sprecher pointed out - evidently in order to raise Fritzsche's importance - that the chief of the German

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1) German transcript, page 5204 and following

2) German transcript, page 3136, English transcript, page 321

press division held a "unique" position, but he did not pass over the fact in silence that he had predecessors and successors in thi, allegedly unique office.

When in November 1942 Fritzsche was appointed by Goebbels as chief of the broadcasting division, he did not obtain a higher position in the civil service hierarchy as a result of it. His activity was purely administrative. It concerned technical-organizational questions. In his affidavit of 7 January 1946[1] my client describes the administrative work connected with it, he also mentions his numerous predecessors. Did it occur to anybody to indict also these persons as major war criminals or to call them supreme commanders of a propaganda instrument? Since this is not the case, the conclusion must probably be drawn that it was not Fritzsche's official position which formed the basis for the indictment.

Justice Jackson, too, pointed out[2] that within the frame wor of the organizations under indictment here, not all administrativ civil service employees and division chiefs or state officials hav been included as a whole; only the Reich Cabinet was named. Therefore, it can also not be imputed to Fritzsche -as is allegedly possible in the case of the members of the organizations- that fro his position alone and the close connection of the individual members of the organizations

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1) Affidavit of 7 January 1946, number 36,
Document Book Fritzsche I,p.66.

2) In the morning session of 28 February 1946,
German transcript, p.5201

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it follows that they must have known and been completely clear about the plans of the alleged conspiracy by virtue of their membership alone.

During Fritzsche's cross examination an attempt was also made by the Russian prosecution to magnify Fritzsche's position. It introduced three protocols as evidence, namely the interrogations of the witnesses Schoerner[1], Foss[2], and Stahel[3]. However, these documents did not produce any supporting evidence. It is true that these depositions were only used to hold isolated passages from them against the defendant. Because of this limitation I could forego the cross examination of the three persons who signed these protocols. But Fritzsche did not fail to express his opinion on those passages which were held up to him while he was being questioned on the witness stand. In this connection I have to point to only one more thing: These three persons did not even claim to have had any insight into the internal organization of the Propaganda Ministry. None of the three depositions contains any definite statement by Fritzsche. On the contrary, these depositions contain mere judgments, judgments which we do not want to know from witnesses, especially not in a case where they cannot furnish any kind of substantiated facts. For this reason alone their value as evidence must be denied. But aside from that aspect, they represent completely wrong judgments. They can by no means be

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1) Deposition Schoerner, Document USSR 472

2) Deposition Foss , Document USSR 471

3) Deposition Stahel , Document USSR 473

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derived from Fritzsche's own statements which were submitted in this trial by the prosecution -namely from his radio addresses.

If evidence against the defendant Fritzsche bearing out these mere judgments could have been submitted, then, in view of the fact that the prosecution could have obtained all of his radio addresses, it would have been more to the point to submit here those statements made by him which would have enabled the Tribunal to form its own judgment. The transcripts of the interrogations only contain the shortly summarizing statement that Fritzsche was Goebbel's "deputy". I confronted the witness von Schirmeister with this assertion and h termed it as pure nonsense. Fritzsche had to say the same on the witness stand. There can be no doubt that the concurring testimony of both witnesses is correct. Finally, there are still hundreds of others who formerly worked in this ministry who could verify the truthfulness of these statements with their own knowledge.

I can state therefore that the attempt at enlarging Fritzsche' position-contrary to the facts given in the organizational chart of the Propaganda Ministry as submitted by Mr.Albrecht- is a complete failure.

Beyond that, the hearing of evidence has shown that Fritzsche was not the creator of the great control apparatus for the German press, as was furthermore claimed by the prosecution. 1)

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1) Captain Sprecher's Brief, German transcript, p.3139; English transcript, p.3218.

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On the contrary, it was Dr. Goebbels and others of his associates. Fritzsche could not have been the creator because of the time element alone.

In the first place, he had been a regular employee for years, he then became a consultant (Referent) and it was only since the winter of 1938/39 that he was one of the twelve division chiefs of the Ministry. When he became chief of the German press division, the policy of the press was set by Reich Press Chief Dr. Dietrich. As has been said already, he became chief of the broadcasting division only in November 1942 and could not create anything fundamentally new there. Neither Goebbels nor Dietrich ever allowed the control of the German press and radio to be taken out of their hands. With regard to the details I want to refer to the testimony of the witness von Schirmeister.

The fact that Fritzsche could have been neither the creator of the press division nor a leader of the German propaganda as far as it emanated officially from the Ministry, is also shown by the other numerous statements both by Fritzsche, when questioned about it on the witness stand, and by the witness von Schirmeister.

During his entire activity, Fritzsche actually never possessed any authority to give orders in these fields, and could not have had it owing to his rank in civil service, which would justify his being called the creator or leader of the press and radio in the Third Reich. On the contrary, between Dr. Goebbels, Dr. Dietrich and him there were quite a number of other higher intermediary posts. In this connection I can also refer to what

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Lieutenant Meltzer stated in general about the importance of a state secretary in the Reich Propaganda Ministry and a Reich Press Chief when he referred to an affidavit by Amann of 19 December 1945: He pointed out that the holders of these positions exercised complete control over the news service in Germnay.[1] Fritzsche never held any of these positions. Incidentally, the Propaganda Ministry did not have only one, but three state secretaries. Besides, Dr.Goebbels had surrounded himself with a Ministry Staff (Ministerant). I believe it is appropriate to point here to this low rank because the prosecution thought, as it did in other cases, for instance in the case of the defendant Goering, to be able to conclude a special responsibility from a high rank, i.e. from a defendant's external position alone. Therefore, one can by no means start from the assumption that Fritzsche exerted any decisive influence upon propaganda in general and upon the policies which were pursued by the press and radio.

The tasks which Fritzsche accomplished on the technical side of the news system involved him only as a journalist and expert. They had nothing to do with the contents of the propaganda which was pursued by the state leadership. In this respect, too, he was only a person who carried out directives. It is true that he set up the technical organization of the journalist news offices. He thereby modernized and perfected them. It is also true that this news system played an important part later in the war. In that respect Fritzsche's work extended only over the period from

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1) in the morning session of 11 January 1946, German transcript, pages 3436-38 in connection with Document 3501-PS.

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1933 to 1938. But it is a fact that in those years he did not have the least influence upon the contents and political trend of the news, particularly in view of the fact that he was a mere employee at that time.

I make these references to Fritzsche's official position within the Propaganda Ministry also for another reason. In admitting what he did and said and wanting to assume full responsibility for it - Fritzsche had an opportunity to explain in detail the cause for and contents of all the excerpts from his radio addresses submitted to him - he cannot, on the other hand, answer for theses which were championed by other offices of the state propaganda apparatus - also for those in his own Ministry. All the less can he answer for the unorganized propaganda of the party. Fritzsche described the various controlled and uncontrolled kinds of propaganda of the Third Reich and pointed out their effects. May I remind the Tribunal that the witness von Schirmeister testified to the effect that even Goebbels could not do anything with the "party doctrine and the "myth" in the field of propaganda. According to the witness, Goebbels did not regard them as things with which to lure the masses. When the defendant Speer mentioned the secret agitation about the miracle weapons, he could point to other sources of unorganized party propaganda. For all that, Fritzsche does not bear any responsibility. His official position was not influential enough to be able to fight effectively against all faulty conditions and abuses.

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Therefore, his repeated attempt to have the "Stuermer" prohibited - he considered this paper an excellent means of anti- German propaganda - remained without success. The party propaganda with all its practical consequences, played a much more important part than that which Fritzsche with his comparatively limited functions could ever have played. I recall the fact, that according to Fritzsche's testimony, even Dr. Goebbels was afraid of Bormann. This was explained by the portentous sentence according to which, it was not the state which had to give orders to the party, but inversely the party to the state.

The hearing of evidence -especially the examination of the witness von Schirmeister- has thus shown without any doubt, that the decisive directives for the propaganda of the third Reich came from other agencies. Goebbels, with regard to whom Fritzsche kept his distance personally, did not allow any of the subordinate officials in his ministry to interfere with his plans. It has been seen that he carried out his plans with the authority of his position, with the adroitness of his arguments, which the world knows, and if necessary by means of fraud. The leadership of the German press policy -let us consider only this narrow sphere- was and remained in the hands of Dr. Goebbels and Dr. Dietrich. The same thing happened with the radio as the witness von Schirmeister has stated, when Fritzsche took over its direction in November 1942. Dr. Goebbels, one of the oldest and closest of Hitler's collaborators, and Dr. Dietrich, Hitler's permanent escort -during the war he was present almost uninterruptedly in his headquarters-, never allowed the leadership of

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the press and radio to be taken out of their hands, especially by a man, who like Fritzsche, had no connections of any kind to Hitler, and had not even had a single conference with him. Ultimately, Hitler's will was decisive here, too.

We have furthermore heard, what influence, -it is of no importance here whether it was due to Hitler, Goebbels or Dietrich,- other governmental agencies too successfully exercized on the press and radio. Here, I will mention the Foreign Office, the High Command of the Wehrmacht and other ministries, the heads of which were much/more closely connected with the three aforementioned personages than for instance Fritzsche.

In order to avoid a misunderstanding I would like to point out that the assertion of the indictment that Fritzsche was closely connected with the party propaganda apparatus, e.g. with the so-called Reich Press Agency of the NSDAP, has been expressively withdrawn by the prosecution in the course of the trial.

With this, I think that I have sufficiently established the limits of the defendant's responsibility. This definition shows the inaccuracy of the widely spread opinion, that Fritzsche occupied a very important and influential position in the "gigantic propaganda apparatus" of the Third Reich. This limitation not only takes into account the legal but also the moral facts, which have been clearly exposed by the production of evidence.

Thus to a certain extent I have already taken stand against the reproach that Fritzsche was a member of the alleged conspiracy. The prosecution has

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repeatedly tried to incorporate Fritzsche's work, at its different stages, in the alleged group of conspirators and has drawn from it conclusions which go so far as to say that Fritzsche was also responsible for war crimes, for crimes against humanity and even for crimes against peace. Already in the arguments of the indictment these attempts seemed to have little relevant justification. It is certainly no improper criticism, if I declare here, that it caused the prosecution a certain embarassment to display Fritzsche's subordinate position as an offical as so important and full of meaning. Today, now that the hearing of evidence is complete, it seems to me, that the attempts to include Fritzsche in the circle of conspirators has miscarried.

Fritzsche cannot be found at any of the sessions, at which Hitler discussed any plans or actions with the closer or wider circle of his collaborators. And apart from this, he never actually took part either in any discussions which might have been capable of plunging the world into a blood bath of wars of aggression. He was neither an "old party fighter" nor was he "decorated" later on with the golden party badge. He did not belong, as I had to emphasize especially, to any of the organizations which are to be declared here as criminal. Up to the end he fulfilled the functions of an offical in a ministry and received directives like any other official. He could never be a political advisor.

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(1) Cf. Indictment and the statement of Dpt. Sprecher at the session of 23 January 1946: German transcript, page 3133, English transcript, page 3212; German transcript, page 3139, English transcript, page 3218; German transcript, page 3143, English transcript, page 3221; German transcript, 3152, English transcript, page 3229 and German transcript, page 3161, English transcript, page 3237.

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In view of the circumstances the bridge between him and the alleged conspiracy, could have been spanned only by the person of Dr. Goebbels. The witness von Schirmeister has repudiated such an assumption. According to his testimony, Fritzsche did not even belong to the closer circle around Dr. Goebbels. Indeed, von Schirmeister could even state that Fritzsche often had to apply to him, because he could not get Dr. Goebbel's opinion on any question other than throu him, as he was Dr. Goebbels's personal press assistant. The relations through th state secretaries - e.g. Dr. Dietrich, Dr. Naumann, to mention only a few - also involved certain difficulties. That is not the method by which conspirator usually communicate.

Moreover, the witness von Schirmeister has said that it was out of question tha Fritzsche could ever have embarked on an exchange of ideas with Dr. Goebbels with a view to forming plans. Now, it would have been the task of the prosecution to prove to the defendant Fritzsche, where his participation in the conspiracy can be seen. I say, that one cannot consider any count of the indictmen as proved.

I think, that it was not Fritzsche's official positions at all, which led to the bringing of an indictment against him. I rather assume that the latter is solely to be traced back to his broadcast speeches, which made him and his name known - but only during the war - both in Germany and perhaps also in a part of the rest of the world.

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All the serious charges levelled against him, lead back therefore only to these addresses. The other assertions concerning his position within the state or party apparatus are only based on assumptions or combinations without any factual basis, as appears for example especially clearly from the purely personal and refuted judgments of Schoerner, Foss and Strahel. But his name has only become so well known, because of the technical means he utilized. Only the great significance of the radio for the modern transmission of news made him appear in a special light. But because of this, it shall not be argued that he thus had a great influence on the German people. Out of our own experiences of Nazi-ruled Germany, I can well say, that every Gau orator, many a district leader (Kreisleiter) used a much more far-reaching language. But, as a rule, the speeches of the latter were only published by the local press.

With respect to these addresses, the defense was handicapped insofar as they could not be made available with their entire wording. Unfortunately, the excerpts quoted during the cross-examination by the Russian prosecution could not be complemented either by the entire wording of the respective speech. Thus, all possibility disappeared of reproducing the sense the respective address had at the time it was delivered. Later on, I will come back to this and give an example of it. The method of submitting only individual passages or quotations to the Tribunal, is here especially inadequate

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because it is impossible to see from it, that in his speeches Fritzsche always put the events of the day in the foreground. It was only rarely and incidental that he drew any general ideological conclusions. But already from what Fritzs has stated with regard to those of his discourses, which the prosecution was able to produce in their entire text, there results a completely different picture as to the cause and motives of his broadcast speeches. From 1932 - thu already before the seizure of power by National-Socialism - up to 1939 the latter were nothing but a political press review. And that is what they were called! Accordingly, they were a collection of quotations from domestic and foreign newspapers.

Fritzsche does not dispute the fact that these collections aimed at promoting the interests of the National-Socialist state. Only during the war, - but right till the end still based on quotations even from the foreign press - these speeches became the platform for the polemical controversy which during the war was carried on on both sides. Without any doubt they did greatly contribute toward the formation of political opinion in Germany, but there is also no doubt that many people in Germany listened to Fritzsche's speeches not for their polemics but in order to learn from his quotations something about the opinions expressed abroad. For years these speeches were chiefly private work carried out alongside his official position. Only during the war they came to be considered as semi-official because of their increasing political news value.

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Thus they assumed - in order to make it clearer - approximately the character o editorials of a newspaper, which - as one uses to say - stands close to the government. It would have been easy for the defense to submit to the Tribunal tomes of newspapers dating from the same time, the editorials of which showed the same trend, and even, as it can be asserted here with all force, used a quite a bit more violent language.

Fritzsche could most definitely - and in my opinion quite rightfully - repudiat the fact that these addresses constituted an incitement to race hatred, to murd or violence, to hatred among nations or to wars of aggression. If such an effec could really have been produced by these speeches, absolutely the same reproach should fall upon any editor of the Third Reich, who received the "slogans of th day" from the Reich press chief. The accusation seems to be levelled against Fritzsche before this Tribunal only because through a technical means he could be heard at a wide range. But it is due to the war - and only since 1939 did his speeches gain a political news value at all - and in the nature of the thing, that the polemist becomes himself the subject of polemics. Especially th one whose influence, considered from t e standpoint of political news value, extended farther technically than the influence of an article in a local paper. Only in this manner became his name better known to outsiders than names of people who were much more powerful than the publicist.

How far the prosecution went in its accusations against Fritzsche in his capacity of a publicist is shown by the fact,

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that not only is he supposed to have belonged to the plotting group of conspirators, but that he is also accused of crimes against peac If a propagandist is subjected to such an accusation, there arises immediately the question of whether public radio speeches would not be the least proper means for carrying through criminal aims of a secret conspiracy. Speeches, which can be heard all over the world, could at the best be suited for camouflaging such aims and for misleading the world. But actually, just the opposite reproach is levelled against Fritzsche. He is supposed to have incited other people.

Thus one may consider that the nature and character of these speeches is sufficiently characterized. Their importance had to be brought in proper relationship to the far reaching conclusion of the prosecution.

Before going into the details of the accusation which states that Fritzsche by radio speeches or by other means contributed towards the various wars of aggression, it is necessary in a case where accusations to that effect, pertaining to criminal and international law, are raised against a publicist, to deal with a legal problem.

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At no point -as far as I can see- did the prosecution consider the question of whether and to what extent propaganda, i.e. the attemp to influence minds, especially during war is subjected to the rules of international law. Perhaps this problem did not come up for discussion because this question, once it is asked, would ha had to be definitely denied. However, while the indictment (1) spea of the "gigantic propaganda apparatus" during Hitler's dictatorship, wh was created as a consequence of the supervision and control of any cultural activity, it does not draw from it any conclusions for a judgment according to international law. For, as a matter of fact no generally or specially valid rules concerning this field have ever been established; also no sort of common law could develop her In this connection it is interesting that in the textbooks of international law, no attention is paid at all -as far as I could find out- to this problem. Nevertheless, a certain number of textbooks, especially those with a tint of natural law, contain regularly in their catalogues of fundamental international law also a section concerning national honor or national dignity. From the equality of nations and their living together in a community governed by international law the requirement is deduced in these chapters that they have to treat each other with respect.

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(1) Indictment: IV,D,3,e.

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Accordingly it is furthermore requested that insults directed by private persons from their own sphere of influence against other countries be prevented, and such excesses be punished when committed. But this idea found its positive legal expression only in a series of national criminal codes which subject to punishment - naturally in peace times only - the insulting of foreign chiefs of state for instance. [1]. Another doctrine which is based less upon natural law holds that it is not a question of legal obligation but one of international courtesy only. Be it as it is, an in some form precisely defined international law does not exist, not even for peace times. Especially not as far as private propaganda through press and literature is concerned. And now: As to war, any directive covering this point is lacking, as already mentioned. According to the prevailing international law there is no limit to propaganda against foreign countries in war. Accordingly there is only one limit to this propaganda, namely the great limit which govern all the rules of warfare, that everything is permitted and only that quod ad finem belli necessarium est.

In view of the tremendous importance of moral influence upon the will of individuals and nations, it is beyond doubt that propaganda can be an important and in certain cases even decisive means of war. Of no lesser

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1) "Crimes against Foreign Countries", Swiss Gazette for Penal Law ("Schweizer Zeitschrift fuer das Strafrecht), 1928, Page 317.

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importance than for instance economic warfare or even the fight with weapons. Propaganda has here a double task: First, to serve as a means for increasing the power of resistance of the own nation and secondly to undermine the fighti powers of the opponent. This influence - rosy coloring on one side, slandering on the other, concealment of facts, etc. - is in its character nothing else than a stratagem which, within the frame work of the rules of land warfare, has been expressly declared as permissible instrument of warfare, according to article 24 of the Hague rules of land warfare. In order to continue this line of thought, it may be pointed out that spying - also a form of war stratagem - has equally been declared as permissible instrument of warfare by the Hague rules of land warfare.

What has been said here is in complete accordance with what is practised by the countries; defamation of the opponent and its statesmen, makir him contemptible, falsifying the motives and intentions of the enemy, defamatory presentation, assertion of unproved statements, all this belongs unfortunately to those means of propaganda which are used on all sides and at an increasing rate during a war.

Small attempts but only for the purpose of preventing war, are known from the time before the first world war. At that time they pursued an even further reaching aim, namely to contribute in general to the understanding among nations by means of a general moral and spiritual disarmament. (Desarmement moral). However this goal was not reached before the first world catastrophe of this century.

After 1918 though, as a reaction after the great armed conflicts, it received a stronger impulse and became known to the world through the tasks imposed u the League of Nations in this respect. This was indeed the first real attempt to start an intellectual disarmament. At the 5th session of the League of Nations in 1925 in Paris it was decided to found an institute for intellectual cooperation (cooperation intellectuelle). Further investigations which lasted for years resulted in numerous propositions, in the establishment of general committees and sub-committees, of sections and committees of experts, with an incalculable wealth of documents. But nevertheless none of these great eff led the idealistic impulse and the longing of the nations for a "moral disarmement" and for intellectual cooperation to a sober and concrete legislatio which would have imposed legal obligations on the individual states as well a on their nationals. No results were achieved in advising a way in which to pr vent during war, hatred, incitement, distortion of facts, and provocation of other nations or of the nationals of other countries in all the possible mode forms of expression. Even such well-defined and comprehensive propositions fo a moral intellectual disarmament as those presented by the Polish Government to the League of Nations in two memoranda of 17 September 1931[1)]

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1) Letter of the Polish Foreign Minister to the General Secretary of the Leag of Nations. Official No: C 602. M.240. 1931. IX. (Conf.D.16.); also reprod uced in Peter Dietz "Moral Disarmament", pages 137-143; Erlangen Library un the number: U 36/3564

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and 13 February 1932 had the same fate. These propositions aimed at using national legislation to prohibit any propaganda, insofar as it might become dangerous for peace, and even any propaganda which aimed at a mere disturbance of the good relations between nations. Influence was to be exerted not only upon the big public news media but also upon the vast ramifications in the administration of any modern state including even the revision of schoolbook These propositions which advised member states to not to recoil even from censorship and measures of prohibition finally failed because of the paradox existing at that time: These propositions were confronted with the deeply - rooted conception that liberty of expression of opinion in moral matters could not be touched by means of such exceptionally far-reaching police measures; this freedom of expression was to be preserved as an "unalienable right" granted by the Creator. And the matter stopped there with this opposition of fundamental principles: We have had here in the courtroom a special demonstration of what censorship and control of the press, radio and films could lead to.

The few bilateral agreements which were concluded after the failure of the Polish propositions of 1931 and 1932 are not worth mentioning here.

1) Propositions of the Polish delegation concerning the progressive achievement of moral disarmament. Offical No. Conf. D. 76. - Also reproduced in Dietz, pages 143-145

They restricted themselves solely to certain sectors of propaganda methods, and only for the duration of good-neighbour relations.

Therefore we can only express the hope that on the basis of internatio solidarity it will be possible in the future to unite these still contrary theses on a higher level.

In this trial a secret order was produced which had been issued by the High Command of the Wehrmacht on 1 October 1938.[1]. The latter in its sectio for international law had a chart drawn up for the case of an armed conflict On this/one chart was to look/up the principles for meeting any possible violation of the rules of warfare by friend and foe. Knowing the legal vacuum in the field of propaganda in its broadest sense it is stated there that from the point of view of international law it is absolutely permissible to render the opponent contemptible and to try to undermine his strength "regardless of how many lies and falsehoods are used for this purpose" and that even from the legal standpoint a rule could be established for the future to the effect that in case the enemy should employ such propaganda, defense by means of "counter attacks" is legally possible, whereby "natural the propagation of atrocity lies" must be used. This may sound cynical and brutal. But unfortunately, it fitted in with the customs of war, or rather: This undisguised statement originated in the actual legal lacunas

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1) Document C 2.

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existing in international agreements and in common law. Dr. Kranzbuehler rightfully stated here: In war there is no duty to tell the truth.

Due to the period of time elapsed since the first world war and its propaganda methods on both sides we are permitted today to consider the happenings of those days as belonging to history. At that time, too, all belligerents reached the point where they tried to undermine the opponent through the means of propaganda. The legend of children's hands cut off by German soldiers - a war lie, as Arthur Ponsonby proved in his book "Falsehood in War-Time"[1] showed up in a French school-book even in the midst of peace, namely nearly 10 years after the first world war.[2] Publications of all belligerant countries, drawings and cartoons, dating from the time of the first world war can be found in abundance in all libraries. Many still remember today the film which showed terrible atrocities and was named: "The Knights of the Apocalypse". A motion picture which circulated almost throughout the entire world at the time of the first world war. And unfortunately the matter remained legally unsettled until today. Is it possible to retroactively include the case of the defendant Fritzsche.

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1) Arthur Ponsonby M.P. "Falsehood in War-Time". Containing an assortment of lies circulated throughout the nations during the great war, published in London by George Allen&Unwin Ltd. Museum Street in 1928.

2) In a school-book for Lorraine: Deuxieme livre de syllabaire Langlois" (Second book of the Langlois primer) which was still in use in 1927 and which refers to these alleged events on page 156 under the heading "Remember"; reproduced in the "Alsace-Lorraine Informations" of 20 March 19

in his capacity of publicist in the Nazi state, into a new international law, the creation of which is also one of the goals striven for by Mr. Justice Jackson in this Trial? Can the desire of the prosecution to see Fritzsche punished as a war criminal be based upon the assertion of a logical development of existing laws [1] when up to now, nothing, but absolutely nothing has been regulated juridically and legally in the field of propaganda and no fertile beginnings of any kind appeared in this direction? The question here is certainly not that of an only apparent legal loophole [2].

What has been said does, of course, not include those cases in which individual crimes were actually incited by means of propaganda. Therefore, I shall now go into the individual accusations of the prosecution in order to show that Fritzsche is not guilty of having committed such acts.

As far as the alleged crimes against peace are concerned, the prosecution starts from the point that any important political and military attack on the part of the German state leadership was preceded by a press campaign. Therefore, the Nazi conspirators

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1) Sir Hartley-Shawcross in the morning session of 4 December 1945, page 62 of the German transcript.

2) Ibid

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The Nazi conspirators for that reason would have had used the pres
also as an instrument of foreign policy and as a feint to cover su
sequent aggressive actions. From that general- perhaps even correc
description of such intentions, the far-reaching conclusion is dra
that Fritzsche may also be co-responsible for those matters. Such
responsibility would be based only on the time factor that he was
December 1938 to the spring of 1942 the leader of the "German Pres
division" within the official Ministry of Propaganda. But such infer
lacks foundation. It could have been justified only if a proof had
found that Fritzsche really was the creator and inspirer of all th
press campaigns. But Fritzsche, if only due to his subordinate
position, subordinate not only in regard to the departmental organ
ation but also in relation to the real leaders of propaganda -Hitl
Goebbels, Dietrich and others-, could have known only what his super
presented to him, as to other employees, as historical truth. I
remind of the fact, that all witnesses, whenever testifying to
influence of the foreign policy on the press, always pointed out,
that before any political and especially before military actions,
Foreign Office justified the measures taken in the field of high
politics before the public by the issue of White Books. Just as in
the case of other intentions or goals of the highest leaders of th
Third Reich, the press was informed also in these instances only
what

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the public was permitted to learn, while matters not destined for publication were kept secret.

After hearing the evidence, what indeed was the relation between the propaganda furnished by Fritzsche and the various military invasions? What could he have known of their background?

On the occasion of the occupation of Bohemia and Moravia instructions by the chief of the Reich press were given to him only a short time before the decisive step of 15 March 1939. They consisted as in all other cases in so-called "Daily Directives" given out at press conferences [1]. Such daily directives found their expression in the headlines of German papers. It may be mentioned here, that the best known organ of the party, namely the "Voelkischer Beobachter" due to its direct connection with the chief of the Reich press - and, during the war, with the headquarters of the Fuehrer - has been more independent of such slogans of the day since it had a foreign news service of its own. What was printed in the "Voelkische Beobachter" does, therefore, not represent what had been approved by Fritzsche as leader of the German press. Fritzsche had already - and that attitude is of great importance in regard to all of his activities - established the principle for his press information

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1) Affidavit by Fritzsche of 7 January 1946, number 28, Document 3469-PS.

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that untrue news should never be given to the press. The apparent reason for that was the fact, that his predecessor in the "German Press" division, Berndt, had all kinds of news spread during the Sudeten crisis, losing thereby the confidence of the leading German writers. Fritzsche on the witness stand as well as the witness von Schirmeister gave details about these matters.

It is not apparent in what respect Fritzsche played a greater part than any other officials or officers when the German troops marched into Czechoslovakia. Whatever has been disclosed in this trial about Hitler's hidden intentions of those days, was as little known to Fritzsche as the plan "Fall Gruen" could have been known to him. As head of the inland press, he could not have had any influence on the propaganda possibilities which were to be made use of within Czecho-Slovakia proper[1].

The same is true of the Polish campaign. There, too, Fritzsche did in no way express himself for an armed conflict or spread purposely some information which might have supported any bellicose intentions. In his very radio broadcast of 29 August 1939, which was held against him during his cross-examination[2], he points out explicitly

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1) Compare the report of the Czechoslovakian government, Document 998-PS.

2) Session of 28 June 1946, speech of 29.8. 1939 from USSR Document 493.

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that there could not in fact exist any serious doubt about the German will fo peace. Those and many other lines are particularly significant in proving Fri sche's good faith. He gave expression to his and the German nation's disappoi ment that Hitler's repeated emphasis on his /will for peace had proved to be a li even a fraud. If one examines in their full meaning the other broadcasts by Fritzsche shortly before and during the Polish campai none of his statement could be interpreted as favoring that war of aggression. The official reasons give at that time convinced Fritzsche as well as millions of other Germans that Right was on their side. That Fritzsche had been sharing such conviction in t times is proved by his admission, declared on the witness stand, that he also feels to have been deceived by Hitler.

It was no different in the case of Yugoslavia. Here likewise Fritzsch was able to learn only whatever facts were given to him and to other leading journalists by the chief of the Reich Press, which Fritzsche had no opportun to verify if only for the speed at which those events were developing, if eve the thought struck him at all that the press was utilized to provoke warlike measures.

The role of the press in the surprising attack on the Soviet Union was made particularly clear in this trial:

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Already for strategical reasons the total propaganda apparatus thus including Fritzsche, as head of the Inland Press division had to be left in the dark. It was just that campaign, which Goebbels cleverly kept secret by simulating an intended German invasion of England. Goebbels consciously directed even his closest collaborators on that wrong track, as was stated here by the witness von Schirmeister.

Fritzsche's statement, that he did not know anything abou secret preparations through the formation of a so-called Easte Ministry was not refuted by the so-called Rosenberg report whi was read to him during the cross examination (Rosenberg's undated draft of a report, Document 1039-PS). This is a document which due to the many names it contains, was used also in othe connections. At the same time it is the only document, which i cludes the name of Fritzsche in connection with some secret pl ns. From that document, which was drafted by Rosenberg and some of his associates according to established facts some time around the 28th or 29th of June 1941 - thus after the start of the campaign - no conclusion can be drawn, that Rosenberg spoke with the defendant Fritzsche before the decisive date. The draft does not bear any date or signature. Besides, Fritzsche is mentioned in it by the title of "Ministerial Director" whic he was given only in the fall of 1942.

Fritzsche's statement on the witness stand has in no way been disproved, namely that he never had been informed by Rosenberg either about an approaching war with the Soviet Union or about an intended formation of a Ministry for the East. Only after the beginning of that campaign and after the official announcement that a new ministry had been established the requests of Rosenberg were transmitted to him by his associates, with regard to the presentation of Eastern problems in the German press.

Thus Fritzsche's deposition still holds that in the case of the war against the Soviet Union, as well as in other instances, he had been informed only at the moment when he was given the pertinent news for publication. That would not imply, as should be admitted, that he played the role of a somehow scheming or at least informed conspirator. And it cannot be assumed that Fritzsche knew anything about the plans of the High Command of the Wehrmacht in June 1941 [1] or even of the Bormann Protocol of 16 July 1941 [2] - both of which were read to him during his cross examination -. Those negotiations show that they could only have taken place in the innermost circle. In this respect the hearing of evidence, which did not concern Fritzsche directly, has shown

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1) Document USSR 477-C26

2) Document L 221.

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that even military means of deception had been used to camouflage the plans. This has been stated by the witness Paulus and from the report of the German Military Intelligence Service.[1] The nature of all these things was such that they could well be withheld from a newspaper man. Even the witness Gisevius, who was always engaged in finding out secret ends, had to admit what efforts were required even within the High Command of the Wehrmacht to obtain information as to whether Hitler was planning a war or not.[2]

In conclusion I want to state, therefore, that the emphatic assertion of the prosecution that Fritzsche was the accomplice of Goebbels in assisting him to hurl the world into a blood bath of wars of aggression[3] is not justified. When I cross-examined Fritzsche he, on the other hand, pointed out: Whatever the facts may have been in the various instances, he and the German public at every moment from the advance into Austria to the invasion of Russia were given only such information as made the necessity of the German actions seem justified.

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1) Doc. 1229-PS

2) Session of 25 April 1946, German transcript, page 8313 and pages 8346/47.

3) German transcript: page 3152; English transcript: page 3229.

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Now one could also conceive the charge of a crime against peace to be that FRITZSCHE constantly called on the German people to hold out during the carrying-out of a war of aggression. Naturally, he did not make any defeatist propaganda in the course of his radio speeches.

I must, therefore, discuss the question whether this or any sort of participation in a war of aggression, after the latter broke out, could be considered as participation in the crime against peace and could be punished accordingly.

The French Chief Prosecutor M. de MENTHON tried to draw the conclusion - proceeding from a literal interpretation of Article 6, Par. 2a of the Charter, without regard for the real meaning of this article - that the soldiers and other representatives of the aggressor state could not undertake any military operations at all which could be justified by International Law. He had to recognize openly, however, that in practise this idea must lead to impossible consequences. Thus, for example, he recognized the Hague Convention for the Rules of Land Warfare as a law which not only obligates aggressor and attacked alike, but also justifies them. He thereby let it be clearly recognized by implication that according to his idea this prescription of the Charter is to be interpreted restrictively.

In Art. 6, Par. 2a of the Charter the following are defined as crimes against peace: The plan, the preparation, the introduction, and, according to the German translation, the "carrying-out" of a war of aggression.

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"Execution" is the translation of theEnglish word "waging". It could be translated more correctly by "undertaking." Undertaking now means in its natural sense about the same as "intend", whoever undertakes pursues, intends something, has not executed it yet. The word "execute" could creat the opini that the crime against peace was not concluded with the outbreak of war and therefore could continue for the whole duration. The result of this conception would be that all the persons, who participated in the war operations, as for instance, the Army leaders, all members of the Armed Forces and beyond that all the persons who supported the war in any way - even by deliveries of war material and through broadcasted speeches - were to be punished according to this decision. They had at least contributed support to the waging of war. These persons could even then be criminals against the peace, if before the war they had in no way participate in the planning or preparation of it. Yes, even if they had no idea that an aggression was involved.

To counter this the following must be stated: Only those can be considered as the executors of a war of aggression who had planned it themselves. They just <u>execute</u> their common plan by <u>starting</u> the war, with or without a declaration of war.

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Thus "execution" ranges on the same level as beginning. The of crime against peace can reach only those who also planned it.

This is supported by the following reasons:

Normally, penal law intends to protect the peace against wars of aggression, i.e. against unlawful wars. In the moment that such unlawful wars start are "unleashed" - as the Indictment puts it - the rightful domain of peace has been violated, the crime against peace is consummated and accomplished. Therefore, no other meaning but "bring about" "proceed to execute the plan" can be attributed to the term "carry through", or "undertake", waging.

This interpretation is also consonant with the historic development of the concept of "crime against the peace" International Law. For many years, international law has made a distinction between "war crime", in the narrower sense, and " war guilt", in the wider sense. War crimes are offens against established rules of the law governing warfare, established by agreement or force of custom; against war practices and, going further, also offenses against humanity. War guilt means being guilty of having brought about war, in particular an unlawful war of aggression.

This distinction found expression also during negotiations on the peace treaty after the first World War. A deposition of this is found in Article 227 ff of the Treaty of Versailles. There can be no doubt that the concept of crime against the peace in the meaning of the Charter is to be identical with this war guilt in the previous meaning of international law.

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Paragraph 6 part 2a has to deal with the war criminals, that is to say those who bring about a illegal war.

The opinion that the further support of a criminally instigated war was likewise a crime against peace, must lead to entirely untenable consequences. Thus hardly any citizen of a country, which had started a war of aggression would be guiltless. The war in its present form is, unlike any previousones, no longer limited to fighting between the armies. It extended - as has been shown in both these World Wars - over all the belligerent nations and over all their vital interests. It grew into a total war. Total in this sense, that everybody takes part in it. The woman, who is making screws in the factory, is cooperating equally in this total war. And, as Professor EXNER so vividly explained in his final pleading, in this war of aggression every arrestation would mean a deprivation of liberty, each requisition a robbery and each shot a murder. It really would be absurd were all members of a nation to be made responsible as authors of crimes against the peace.

A classification as to the grade and kind of the constribution towards the war would moreover be practically impossible.

Crimes against peace therefore can only be committed by those who were collaborating in breaking the peace, whilst the bulk of the people, who had not participated in it, could not be counted in this cathegory.

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The point of view which has been developed here is, in my opinion, also represented in the Indictment. The latter considers the crime of breaking the peace realized by the "unleashing" (Entfesselung). In no place has it even been hinted that the crime itself or its continuation is seen in participation in war or in its support by production or supply of any kind. Also, according to the drawing up of the indictment from the period of time from the beginning of war onwards, only crimes of the second and third group come into question, also war crimes in the more closely defined sense of International Law, and crimes against humanity.

In my opinion Justice Jackson, in his opening speech of 21 November 1945 also took the point of view which has been advanced here, whereupon it was pointed out to him in the Session of 1 March 1946: Justice BIDDLE called his attention to the fact, that at that time he had indicated that the beginning of war was the character of the crime and NOT the engagement in war itself. 1) i.e. in other words, that with the beginning of the war of aggression the crime against peace within the meaning of Article 6 Paragraph 2 a of the Charter was completed (breach of peace).

From these statements it is to be concluded, that any activity DURING the war which furthers the war cannot represent a criminal act, neither can the radio broadcasts of FRITZSCHE, which he made during the war.

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1) German Transcript, page 5282.

The next group of accusations levelled against the defendant is for inst ce characterized by such terms as: incitement against Jews, incitement against foreign nations, incitement to exploit occupied territories, propaganda for the "master race".

On the witness stand Fritzsche made a declaration which represents a summary of the knowledge he gained after the collapse and above all here in the court. It ran as follows: An ideology in whose name five million people were murdered must not be permitted to survive this event. Now how far did Fritzsche make propaganda for this anti-Semitism? Was he able thereby to foresee this murder, did he approve of it or at least tolerate it? The prosecution went very far in its assertions: It maintained that Streicher as "the chief Jew-baiter of all times" could hardly have surpassed Fritzsche in his defamation of Jews. Fritzsche defended himself against this accusation. And rightfully in my opinion We see this quite clearly when we compare t e slogans from the arsenal of anti-Semitism, which Sir Griffith-Jones read for hours in excerpts from the "Stuerme at the session of 10 January 1946, with Fritzsche's statements submitted here by the prosecution. Fritzsche - supported by the affidavit of Scharping dated 17 May 1946 [1] - was able to point out

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1) Document-Book Fritzsche II, pp 6-15, affidavit of Dr. Scharping of 17 May 19 Fritzsche Exhibit 2.

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what he undertook against this paper. It must also be noted here that the language and arguments of the "Stürmer" found no echo in any German newspaper or at a single broadcasting station of the national-socialist regime.

Before the war Fritzsche carried on no anti-Semitic propaganda of any kind. All the statements submitted by the prosecution originated during the war. They are, however, not directed against the Jews as a people or as a race, but are related only to the question of the origin of the war. They only mention occasional polemical introduction of the Jewish question in the propaganda battle which was fought in this war alongside the battle of arms. This explains the fact that the radio addresses submitted by the prosecution never contain more than casual remarks and never speak of the Jews by themselves. Each of his radio speeches may be examine to this effect. Nor does there exist a speech by him which would have dealt exclusively with the so-called "Jewish problem". He never talked on such a subject. Fritzsche always spoke simultaneously of "Plutocrats", "Bolshevists", "Democra and used other such phrases by means of which the propaganda of the 3rd Reich felt obliged to donduct its battle. During his cross examination as witness he dealt in detail with each of the radio addresses submitted in the trial and discussed the reason

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he had each time for making merely incidental remarks on this subject. An examination of all of his statements over the radio would show that of all the fundamental propaganda subjects of Nazi-ideology Fritzsche mentioned and advocated anti-Semitism least of all.

This takes all foundation from the conclusions of the prosecution. For there cannot be any connection between such rare statements on the part of Fritzsche and the murder order given by Hitler. I therefore expressly protest against the accusation that Fritzsche be more guilty than those credulous men who carried out the shootings.[1] In the course of this trial we have hea many testimonies as to what secret and ultra-secret means and methods were used by the really guilty ones to carry out this horrible murder. So many testimonies cannot be put aside as irrelevant and unreliable. Contrary to former assumptions this trial should have made it clear that there existed only a small group of instigators and initiates. It has not been proved in the le that a man like Fritzsche belonged to this closest circle of Hitler's despotism. The trial has even shown that he made the acquaintance of the majorit of his co-defendants here in the dock only.

To draw such far-reaching conclusions against Fritzsche would necessaril lead to the assumption that everybody who took a public stand for anti-Semitism as such

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1) German transcript: Page 3152; English transcript: P. 3229.

if only with reservations, bore the same criminal guilt. The extent of moral guilt is much greater. It concerns us, however, only insofar as the moral guilt is identical with the criminal guilt. And therefore there is no need to discuss here how far a mere error - even a political one - may at the same time become immoral. The accusation, however, of being co-responsible for these murders, was an especially deep blow to Fritzsche.

With regard to this it might be objected that although Fritzsche did not stand very closely to his chief Goebbels and to the other heads of the information control, he was yet one of those persons who had access to the foreign press and radio news. This is perhaps the reason why Fritzsche is accused of having had knowledge of almost everything that happened during Hitler's rule. Fritzsche was able to state in the witness stand and to quote too, a number of details, on the point that even with this opportunity his faith was not shaken in the questions which were decisive - perhaps also morally..This no more enabled him to realize actual happenings, than his profession of journalist which gave him the opportunity to follow up rumours which were appearing, for himself. He could not break down by such means the wall which had been erected in front of the misdeeds.

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With regard to foreign reports on atrocities and other misdeeds Fritzsche as well as von Schirmeister and especially Dr. Scharping have stated that the examination by the office "Schnelldienst" (express news service) which was carried out in all cases, resulted time and again in official replies which eliminated doubts as to the inaccuracy of such statements from abroad. This office, the "Deutscher Schnelldienst" (German express news service) -which had an entirely different significance from that claimed by the prosecution was a control agency created especially by Fritzsche in order to have foreign news tested as to the truth of its contents through inquiry at the competent German official agencies. If the defense had succeeded in submitting the records of this "Schnelldienst" to the Tribunal documentary evidence could have been offered in every detail for the way in which German authorities answered inquiries of this kind.

For instance the RSHA knew in a masterly way how to make its replies sound credible. The foreign propaganda which had to serve a finite purpose could on the contrary lay no claim to any great power of persuasion. This all the more since enemy propaganda in war time also brought of course positively incorrect reports, of which fact Fritzsche was often able to convince himself.

Furthermore Fritzsche has been accused of advocating the doctrine of the "M a s t e r R a c e".

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The only statement by Fritzsche himself which the prosecution submitted in regard to this point, shows clearly that Fritzsche neither championed nor promoted such an idea, on the contrary, expressly rejected it. An examination of the quotation presented by the prosecution does not leave any doubt about it. Beyond that the hearing of evidence(the witness von Schirmeister and the affidavit of Dr. Scharping) has shown that Fritzsche prohibited the use of the word "master race (Herrenrasse)" for press and radio altogether. Fritzsche himself under oath termed this assertion nonsensical. Therefore, after thorough examination of all obtainable speeches by Fritzsche I can only state that this charge is untrue. Nothing is changed in regard to this statement by the fact that Foss and Stahel [1] judged differently without giving any concrete facts. I already dealt with the value of these documents as evidence.

Fritzsche allegedly s t i r r e d u p h a t r e d against f o r e i g n p e o p l e s. To prove this serious charge the prosecution emphasized several excerpts from two of Fritzsche's radio addresses which were held on 5th and 10th July 1941. In order to be able to understand correctly the circumstances surrounding the speeches, one must take into consideration the dates on which they were held. They were made shortly after the attack on the Soviet Union, He is not charged with any further statements - made for instance at a later time or similar ones which

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1) Document USSR - 471, 473.

might have shown some kind of system. When the passages cited by the prosecution were supplemented by the full text of the speeches[1] and by the examination of Fritzsche on the witness stand it was shown that Fritzsche did not slander the Soviet Union in them. Neither could what had led up to these speeches have given him any reason to stir up hatred against that country. They were held shortly after German sources and in particular war correspondents had reported atrocities, in towns in Galicia which had been conquered by German troops. These were things which were reported everywhere in Germany -but also by foreign correspondents- in print, pictures and motion pictures. In this respect there was an especially great volume of material and in his speeches Fritzsche expressly referred to it. Fritzsche's statement reflect the agitation of the German public over these reports and he pointed to those presumed to be guilty of the atrocities.

The facts as such were also confirmed by the Russians. The latter added, however, that not the Russians but the Germans were guilty of these actions. What happened was only that on the basis of undeniable facts a controversy had flared up as to the responsibility -just as happened later in the famous case of Katyn- in which both sides morally condemned the instigators.

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1) Document Book Fritzsche I, pages 8-19.

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In neither of those speeches, as an examination of their entire contents would reveal, Fritzsche designated entire nations as inferior or sub-human. Phrases about "Sub-humanity" referred only to those culprits whom in real indignation he pilloried as morally contemptible. He could believe the proofs presented by the Germans and therefore there is no reason to assume that at the time he held the speeches he could have predicted what actually happened in the East much later. Therefore there could not have existed any intention on his part to stir up his audience to engage in similar actions. It is impossible to establish any causative connection on the basis of two such words he had spoken once.
The same is true of the excerpts from a speech of 29 August 1939, which General Rudenko read to him during his cross examination.[1] That broadcast also refers to atrocities, committed shortly before the outbreak of the war in Bromberg and concerning which on the day of the speech - that being the reason for it - an official White Book had been published. The results of an investigation of those atrocities were summarized in it. Only the guilty ones were designated by Fritzsche as inferior human beings. But it is not justifiable to generalize this opinion to such an extent

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1) Document USSR 493, quotation of the speech of 29.8.1939)

as though he had designated the entire Polish nation as inferior. Fritzsche considered the representation in the official White Book as correct. He could not have doubted the fact that Poles had killed Germans. However, no word in that speech allows for the conclusion to be drawn that he took the opportunity or even suggested that the Slavic nations be exterminated. The German people no more than Fritzsche could imagine anything like it at that time.

General Rudenko attempted in his cross examination to prove that my client had made false statements. For that purpose an excerpt x) from his broadcast of 2 May 1940 was presented to him 1). In it Fritzsche gives a description of the towns, villages and hamlets which he had visited shortly before, and which had remained undamaged by war. The Russian prosecutors pointed to the official report of the Norwegian government 2) enumerating the damages caused by the war. Thus the impression was created that Fritzsche was lying to his audience. The full contents of that speech shows, however, that the quoted sentences regarding undamaged houses in Norway stand directly next to other sentences in which Fritzsche himself depicts the destruction caused by the fighting in Norway.

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1) Document USSR 496; German Transcript: page 12298.

2) Document 1800-PS

x) - and this is the example I mentioned before for the insufficiency of such evidence in general

We, Annemarie C. Catlin, Bert Stein, Dorothy Plummer, herewith certify that we are thoroughly conversant with the English and German languages; and that the above is a true and correct translation of Document.

ANNEMARIE C. CATLIN
X 046172

BERT STEIN
B 210 875

DOROTHY PLUMMER
USFET 482

July 24, 1946.

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The statement does not contain a lie if FRITZSCHE has reported in it that in other parts of the country he visited not the slightest trace of fighting was found. His description, therefore, is not in contradiction at all to the Norwegian Government report.

At this place, I should like to insert a few remarks about the case of the "Athenia" and the part that FRITZSCHE played in this connection. This case shows to what extent FRITZSCHE was at pains not to retransmit reports until they were proved to be true and reliable. But it shows also how dependent FRITZSCHE was on the version of the official German offices. This supports his good faith, for the principle that official announcements are to be believed with absolute faith and which was naturally the reason for his conviction, could not at that time be shaken.

That particular article in the "Voelkischer Beobachter" dated 23 October 1939 has been rightly described in this trial by all parties as contemptible. Now, FRITZSCHE also engaged in polemics on this point in sharp if not similar terms. I take the liberty of pointing out that such remarks could be morally condemned only if FRITZSCHE had known beforehand that it was actually a German submarine which sank the "Athenia". But as he has testified under oath, this fact first became known to FRITZSCHE here in Nuernberg in December 1945. Before that, he was precisely the person from whom this decisive circumstance was withheld, although he had, through the naval liason officer, undertaken investigations at the Naval Supreme Headquarters and other official headquarters concerning statements by foreign reports.

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To support the charge that FRITZSCHE instigated the ruthless pillage of the occupied territories,[1] the only evidence submitted is a statement made on the 9 October 1941.[2] In this, a passage from a public speech made by HITLER a few days before is reproduced. I have been at great pains to find an instigation to ruthless pillage of occupied territories in this quotation as well as in the remarks made by FRITZSCHE about it in his radio address. It is inexplicable to me how any sentence can possibly convey anything to this effect. I can only assume that it is a case of a misunderstanding and leave it for the Tribunal to judge.

In no other connection has FRITZSCHE spoken a word or given a hint to this effect and, least of all, openly called for such a thing. Moreover, it is to be gathered from Dr. SSCHARPING's affidavit dated 17 May 1946[3] that the use of any kind of coercive means against other nations would have run counter to the purpose of his whole work, including his work within the Propaganda Ministry, namely to gain the voluntary cooperation of the European populations.

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1) Indictment by Captain SPRECHER, German Transcript: page 3159; English Transcript: page 3235.

2) FRITZSCHE Document Book I, page 22 - 25

3) FRITZSCHE Exhibit 2 FRITZSCHE Document Book II, pages 6-15.

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It has also not been proved that FRITZSCHE knew really more about the manner in which foreign workers were actually recruited. I would point out that the defendant SAUCKEL stated he had only one brief and unofficial talk with FRITZSCH and that in the beginning of 1945. In his Affidavit FRITZSCHE, gave further the exhaustive details (1), also on the fact that he obtained extensive material from the competent authorities for notification to the German public, in which the free will basis upon which men were being recruited for employment in Germa was continually pointed out. It is inadmissible that information concerning this was given to the Ministry of Propaganda other than that given by SAUCKEL in his report to HITLER (2)

Moreover nothing has proved that FRITZSCHE approved or used for Propaganda purposes the violations of International Law, already committed or intended, such as the so-called Commissioner's Decree, or the Lynch Law against enemy aviators, who had been brought down. As regards the Commissioner's Decree, the Russian Prosecution charged the defendant that as a soldier, as a member of the 6th Army, he took cognizance of this decree.

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(1) Affidavit of 7 January 1946 Figure 39.

(2) Telotype SAUCKEL of 1o March 1943 Document 407 - PS II.

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This has been confirmed by FRITZSCHE. He could, however, point out that his attitude had not only been passive. He even, as will have to be confirmed, took a successful stand against this by way of proposals to his Commander-in-Chief, witness PAULUS.[1] General RUDENKO's charge, that in spite of this he remained in HITLER's service, although he should at least have assumed that HITLER was the author of such an order contrary to International Law, is not a reason for accusing FRITZSCHE as a propagandist or even morally as a man. My Lord Justices! If such an accusation with a criminal legal foundation could be made, it would rest upon every German soldier who fought on for his Fatherland in the East after the autumn of 1942.

FRITZSCHE also protested against the fact that Allied fliers were treated contrary to International Law. When he learned this, he spontaneously refused any propagandistic activity for GOEBBELS in this sphere. These facts have been ascertained through his thorough examination on this subject and through Dr. SCHARPING's Affidavit[2].

Furthermore, no charges can be made from what he said about the USE OF NEW WEAPONS AND THE "WERE-WOLF" MOVEMENT in his radio speeches, with which he has been charged by the Russian Prosecution

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1) Compare also PAULUS' Statement of 12 February 1946, German transcript: pages 4270/71.

2) SCHARPING's Affidavit of 17 May 1946, FRITZSCHE Exhibit 3, Document Book II, pages 16-19.

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I can be spared mentioning particulars in this connection, because FRITZSCHE could testify in detail. The speech of 7 April 1945, [2] with which he is reproached, does not in the least glorify forms of warfare contrary to the International Laws. It rather attempted to find a psychological reason or excuse for the active participation of civilians in the fighting towards the end of the war by referring to the suffering of the German people through the effective air activity of the Allies.

I must only reply to one point of the evidence:

General Rudenko submitted to FRITZSCHE a short document at the end of his cross examination. [3] It is the question of a copy of a short message, signed by FRITZSCHE, of 19 October 1944 addressed to MAJOR VON PASSAVANT a wireless expert of the Propaganda Branch of the OKW. The Russian Prosecution wishes to conclude from the contents of this communication, that FRITZSCHE had committed himself in the preparation and execution of some kind of "biological war." Since a conclusion cannot possibly be drawn from the contents. It is merely a covering message of five lines referring to the transmission of a letter of a radio listener to another department. FRITZSCHE's department received daily whole bunches of

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1) Document USSR - 496, Speeches of 16 and 17 June, 1944 and 7 April 1945.

2) Document USSR - 496.

3) Document USSR - 484; compare with session of 28 June 1946, German Protocol, pages 12314 and following.

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letters from unknown radio listeners. A subordinated official looked through such letters, of which hundreds arrived daily, and directed them wherever they would perhaps receive special consideration. Nothing different happened with the letter of the radio-listener Gustav OTTO from Reichenberg, which apparently contained a suggestion to carry out "biological warfare". Although FRITZSCHE signed the transmitting letter composed by the subordinate official in his capacity of Department Director, he naturally did not know anything about the contents of the listener's letter. With the large number of daily communications from listeners it was completely impossible for him to read them. This listener's letter, in any case did not find any special attention in the Broadcasting Department. The copy of the transmitting letter, as can be seen from pencil notes made thereon, was also immediately put away. How can anything unfavorable be deduced against the defendant FRITZSCHE from this evidence? Especially since it is completely unknown what the likewise unknown listener meant by a "biological war".

Finally I have yet to point out the following: General RUDENKO has read the document on the occasion of the cross-examination, and that from a Russian text. The German text, which appears in this form in the German Transcript on Page 12315, and the English text, which appears in this manner on Page 12606 in the English Record, differ in content considerably from the German original text.

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If notwithstanding the insufficiency of this document - the meaning of which could in any case be clarified only by the "enclosures" which are lacking - the Prosecution believes it deserves consideration, the first requirement would be to have completely exact translations made from the German original text.

In concluding my estimation of evidence I wish to say: None of the documents brought up during the cross-examination of the defendant FRITZSCHE could modify the impression which he gave us during direct examination: To have spoken before this Tribunal in sincerity and truthfully: and that because of his own endeavor also to make by himself every possible contribution to that an actual foundation for a proper judgment may be found. And going even further, all the statements made by FRITZSCHE were supported in all decisive points by the documents which I submitted, and particularly through the testimony of the witness von SCHIRMEISTER. The latter, who during the most meaningful period of 1938 to 1943 was the daily companion of GOEBBELS, was able to report directly and, I dare say, in an observing way, on the actual relations within the Ministry of Propaganda. The result of the evidence - I may repeat here what I expressed in the introduction - was unequivocal for my client. Contrary to the announcement made by Mr. ALBRECHT at the beginning of my final pleading, nothing during the proceedings could add to the contention that FRITZSCHE's importance in reality was greater than that diagram of the Propaganda Ministry showed.

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The discussion of the bare facts alone ought to have made clear that FRITZSCHE can in particular bear no responsibility for what is, as far it can be judged from afar, the actual part that may have been played by the extensive apparatus of the whole Third Reich propaganda in the plans and in the hands of a small initiated circle. If the restricted department in which FRITZSCHE cooperated was misued, then FRITZSCHE himself was exploited. The assumption that FRITZSCHE was GOEBBELS' closest collaborator, his right hand man so to speak, and even his acting deputy - an as sumption from which the bulk of the accusation levelled at him are probably derived - is already refuted by the facts that have been discussed. The odium against FRITZSCHE on the alleged ground that he bears a responsibility equal or similar to that of GOEBBELS has already been definitely shown by the evidence to be unfounded. Alone, the actual actions and proceedings of my client ought to make it clear that the assertions of the Prosecution have gone much too far.

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In the legal consideration of these acts and measures of FRITZSCHE by Captain SPRECHER, it was quite striking that - as far as I can see also in distinction to the other defendants - at only one point was the quite general conclusion drawn that FRITZSCHE was during a definite period, the principal conspirator, because he was directly entrusted with the manipulation of the press.[1] I need not mention here again that the factual grounds of assumption for such an opinion did not exist. Now I am only concerned with establishing, in view of the legal qualification by the Prosecution itself, that in his declaration his activity should be considered rather in the sense of forms of participation. The speech of the Prosecution points out in several places that FRITZSCHE had been called to account by this Court because of his ... auding and abetting,[2] he is characterized as an "accomplice" of GOEBBELS[3] he had assisted in producing propaganda material,[4] he helped in making possible an

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1) German transcript: pages 3146/47; English transcript: page 3324: "principal conspirator directly"

2) German transcript: page 3163; English transcript: page 3339: "able role on behalf".

3) German transcript: page 3152; English transcript: page 3239: "helped"

4) German transcript: page 3139; English transcript: page 3218: "he assisted".

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atmosphere of hate,[1] he had supported[2] and more of the same, thereby stressing that he could not have been among those who did the planning. On the other hand it is said also of this defendant that he instigated[3] incited[4] thus taking an active part as instigator, stimulator and inciter.

The first question now is: Is the accessory helper also a participator within the meaning of para. 6 of the Charter? This question, it seems to me, has not yetbeen discussed by Dr. STAHMER. But the case of defendant FRITZSCHE offers an opportunity for this, because he has been characterized to a particular extent only as an accomplice. I am,therefore, compelled to give the question closer scrutiny. These four concepts: leader, organizer, instigator and participator are said to be equivalent on account of their external composition. The four possible perpetrators must also be dealt with in the same manner. These four concepts,inasofar as they differ linguistically, can therefore only explain in what different forms a plot can be fashioned.

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1) German transcript: page 3158; English transcript: page 3234: "helped".

2) German transcript: page 3162; English transcript: page 3238: "to support"

3) German transcript: page 3152, English transcript: page 3229: "Instigations and incitements", also German transcript: page 3150; English transcript: page 3226.

4) German transcript: page 3154 and 3156; English transcript: page 3230: "to inflame", and page 3223: "incitements".

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The one instigates, the other organizes, the one leads the gang, the other takes part in the plot in some other way. Therefore all four conceptions are closely connected with the common plan. They are united only because of the common plan. Only that makes them true accomplices. To jointly make plans, to jointly want to carry something out that is the main concept of these four subsidiary concepts. Only the functions amongst themselves can of course be different. They can also be shared by the conspirators themselves. If the conspirators have jointly invented the plan, have formulated it or, by agreement, have merely furthered it, than it should be of no consequence which part each one of them plays in its execution. It should therefore be basically also unimportant whether within this plot someone is the leader the inspirator or merely another participant in this plan. However, everyone presumably will have to participate in this plan. He must have recognized its purpose at least, for according to the words of the charter, he must have "participated" in it and that either

a) in the formulation or

b) in the execution of a common plan or

c) in some other conspiracy for the commitment of an individual crime.

Only than is he responsible for others when in

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the execution of such a plan, someone commits a crime.

The word "accomplice" refers therefore to the plan. He is an accomplice in the plan and is in no respect different from the leader or instigator. A more far-reaching meaning in an accessory sense must therefore be far removed from this concept.

In common law, the accomplice's concept as main concept has also an altogether different meaning for the accessory. By accessory, according to the common legal conception, only one of the forms of accomplice is understood, and that the form by which an outside deed is only supported or furthered. A deed which the accessory does not exactly want for himself. It signifies the dependence, the accessoriness of the bare support of the main deed. Article 6, last paragraph of the Charter cannot have such a meaning. There the participant is to be put on an equal basis with the accomplice, whereas in common law the accessory, as subordinate participant, can never be accomplice in a punishable deed. In common law the assistants are merely accessories. It cannot have been the intention of the creators of the Charter to regard the mere accessorial assistant as participant in the plan. Since whoever participates in a plan is to answer fully for the deeds of others, also than if he has only subordinately participated in the formation of the plan. However, on the contrary it must than follow: Whoever does not participate at all in the formation or discussion of a common plan.

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can therefore assume no full responsibility for that which others have done. It is thereby a matter of indifference whether the others committed a crime in the execution of a plan or only incidentally upon the occasion of its execution. The responsibility of the one for the deeds of the other can only exist when the plan binds them together. It is for this reason that the concept of conspiracy presupposes of necessity the idea that what is being done takes place under the impulse of a common will and a common knowledge in relation to the plan.

This sense of participation restricted to the plan is, in my opinion, expressed also in other parts of the Charter. Already in Para. 1--and not only in Para. 6, Section 1--it is mentioned that in execution of the Four-Power Agreement of 8 August 1945, the "principal war criminals", the "principal culprits", the "principal conspirators" or whichever way it is expressed, should to begin with be called to account here before this Court. Assistants, accomplices, simple agents of execution and all other merely dependent, accessorial perpetrators who do not belong to the central body--that is to say who are not connected with the conspiracy plan or are in closer agreement for the carrying out of a single crime--cannot be considered as belonging to such a group. Within the meaning of conspiracy and of the substitution of the one for the other connected with it, there can be no simple "helpers" at all.

For the defendant Fritzsche I have demonstrated that he

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--owing already to his position in the State and the party structure--cannot belong either to the restricted group of conspirators nor to the wider group of the organizations. Moreover Captain Sprecher has himself pointed out 1) that Fritzsche is not represented by the Prosecution as the type of conspirator who would have thought out the all-comprehensive strategy. His particular field even lay outside the conclusion of the plan. But it was not necessary to have himself correctly understood the basic strategy to have perceived the aim, when he became the spokesman of the conspirators. I believe that the latter conclusion, if the concept of participator in the sense of a conspiracy is rightly estimated, embodies an error of thought. He who stood outside the makers of the plan, certainly does not belong to the group of conspirators.

After these legal arguments which are even supported by the opinion of the Prosecution, I come now to this conclusion. The defendant Fritzsche, against whom it has not been proved here that he took part in any common planning, can on this account also not have been a participator in the alleged conspiracy. At any rate he cannot be punished according to Para. 6, last section. According to the intellectual construction of the Charter there should be somewhere a limit fixed concerning the arraignment of a single person in these trials. When is anybody still a participator--accomplice--and when is he no more so, but only perpetrator or helper?

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1) German Transcript: Page 3161; English Transcript: Page 3237.

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Where is this boundary which sets of the responsibility for individual deeds from the responsibility for that which others have done? Because there must be a dividing line for this collective responsibility also. I mean the common plan is this dividing line. He who does not belong to those who did the planning should also be left out of the group of conspirators.

On the other hand the framers of the Charter provided

a) establishment of a single individual as criminal culprit even though he does not belong to the group of conspirators and

b) declaration of an organization as such as a criminal organization

If the defendant FRITZSCHE does not belong to the group of conspirators as established - was never a member of even one of the organizations being prosecuted here, he could be convicted only if he as an individual had committed crimes as covered by article 6, paragraph 2, a to c of the Charter. In that case, however, just as in any ordinary criminal procedure, the prosecution must furnish him the proof of a criminal offense. If he does not belong to the conspiracy, if he does not belong to an organization, the Prosecution cannot derive its support from a so-called legal assumption, an assumption merely said to result from membership in an organization. It is not possible to reverse the burden of proof.

The second question then is: Did FRITZSCHE as an accessorial accomplice or abettor, belong to the class of those criminals of whom it has been proven

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that they as individuals committed crimes against the peace, a violation of law governing warfare, or a crime against humanity ?

He as an individual is not charged to have committed one of these crimes with his own hands. The charge is directed against him only by reason of his activity as an accessory.

As far as I can see, the establishment of the concept of the accessorial accomplice is not something foreign to the English and American criminal law. However, the common law is governed by the principle that the accomplice falls into the same class as the perpetrator, in other words that - irrespective of the measure of his personal culpability - he should be punished, in principle, just like the perpetrator. It is said that at all times the English law was inclined to apply the principle of equal punishment for perpetrator and accessorial accomplice. 2) The reason for referring here to the English common law merely is to establish a link with the German concept of law. The establis' is therefore sufficient

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1) Chronological differentiation: accessories before the fact, principals, accessories after the fact. A differentiation of principals is also made according to the degree of the matter, dividing them into first degree and of second degree; the latter are also segregated into those which assisted in execution itself through advice (abetting) or those who lent aid during commission of the deed (aiding).

2) Mention should be made that an English law (act of 1861), for example, makes a differentiation between accessories and abettors, abandoning - even though merely as a matter of choice - infliction of equal punishment in the case of different types of crimes: so that in the case of felonies equal punishment may be inflicted: " may be punished, " [redacted] ," in case of misdemeanors, it is true, equal punishment must be imposed "shall be liable to be punished."

Thus, for the moment mere establishment of the fact that English law and American law know differention between the concept of a perpetrator and someone who merely acted as an accomplice, may suffice.

On that point however, a decisive difficulty arises, resulting from the fact that there is a difference in the concept of right and of wrong between the Prosecution and the Defendants. The concepts are bound to differ because the Statute Law is not the same.

That is the reason why I cannot as yet conclude my legal argumentation: differences in concept, which may be equally common in both spheres of law, result in different inferences of law as far as Statute Law is concerned.

The British Chief Prosecutor (1) referred to the individual responsibility of each single defendant according to the letter of para.6, section 2 a to c of the Charter. In that connection he remarked that it is a commonplace in common law that persons who help a criminal and shield him, who give advice and help to a criminal, are criminals themselves. Perhaps he wished thereby to advocate the conception that according to the spirit of the development of English law such persons, by reason complicity in someone else's deed, should be punished in the same manner as the main perpetrator; that the accessoriness of the accomplice - if I understand Sir Hartley SHAWCROSS

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1) Morning session of 4 December 1945, German transcript of Court Proceedings, page 625.

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correctly, is in principle without importance for consideration by common law. In practical effect this might mean that the difference between the concept of accomplices and accessories plays no part here, or at best might determine the degree of the respective responsibility for the measure of the individual guilt. Is it intended, in principle, to judge, him who merely supports the deed of someone else exactly in the same way as applies to him who carries out the deed as his own? I may refer to the effects which such concept might have on the measure of punishment, for example. 1)

At this point it might be in order to say this: The legal maxim propounded by Sir Hartley SHAWCROSS may indeed be commonplace for every member of the English or American legal professions. This does not hold true for a German defendant, however. As I also infer from the argument of the French Prosecutor, Dubost, this does not seem to hold true for French Common Law, because he pointed out that according to the principle of penal law, strictly speaking, all the defendants could in that case not be considered as main perpetrators but merely as "accomplices. 2)
And because the confines of common law concepts are too narrow, it is the opinion of the French Prosecution that the deeds which are to be adjudicated here

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1) An effect which would be of particular importance only in connection with capital punishment that can be absolutely determined.

2) Morning session of 1 February 1946, German transcript of Court Proceedings, page 3664.

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are not equal to the common law with its rationalistic statics, that it would be necessary to apply a law which goes beyond this.[1)]

The concept of conspiracy therefore, - the science of the plot - and the practicability to declare an organization criminal, are to be the vehicle by means of which it will be possible to go beyond the common law. However, how about the case of a defendant who does not belong to the conspiracy nor to an organization? After all, law must be applied! This then leaves nothing but the common law for judging the individual deed. Which law other than general concepts such as, for instance, guilt, dolus, carelessness and also the accessoriness of the accomplice can be applied? It is possible that through the establishment of new facts of the case, the Charter created new substantive law. But what is the juridical concept with which to approach these new facts of the case? Classification of actual circumstances will probably have to be made by means of the analogy of penal law concepts. As regards the facts of the case listed in para. 6 b and c of the Charter, these correspond essentially with the facts of a case in common law. A defendant as an individual who did not take part in laying out the plan, and who did not belong to an organization, can then be judged only according to principles which also must apply for every other delict of common law. If concepts

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1) German transcript of Court Proceedings, page 3664

such as the accessorical accomplice, are involved, argumentation against a defendant can take place according to common law only.

The legal consciousness has had to face the most complicated legal problems, particularly in connection with the doctrine of the form of participation; in other words with the question as to how an accessory should be classified according to the various possibilities of participation. From this in particular results the decisive question: is it possible that the Charter went so far as - I repeat: what is involved are common law concepts - it is a question here of banning if possible concepts of common law, of respecting the old established legal concepts of the defendants in judging the accessorial assistants. Is it possible that it entirely ignored even the completely different structure of Statute law?

In view of the utterly different nature of Statute law - especially with reference to the question of accessorial assistance, I ask permission for a few legal dogmatic remarks on the conception of German law. In all fairness and at least as far as the concept of an accessorial accomplice is concerned, a German defendant can be charged only with what is known to the concept of law adopted by his people and which, at the same time, is in keeping, morally, with his sphere of knowledge. That is the decisive point!

By reason of the provisions of Statute law in para. 49 of the Reich Penal Code there is not only a strict separation between the accomplice

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and the perpetrator as far as the concept is concerned, but necessarily and as a matter of principle he is also to be punished less severely than the perpetrater himself. Jurisprudence and judges, therefore, have made a sharp distinction between the perpetration of an act itself and the mere instigation or support of somebody else's act by accomplices. This distinction is made not only in accordance with external characteristics, and so according to objective factors, but also with regard to what occurs in the mind, and so according to nebjective factors. During decades of the German law, particularly in the law of the Reich court, this is expressed in such a way that, in the case of assistance in somebody else's action, the accessary is said to have/the animus socii, but the perpetrator himself the animus anctoris. According to German law the assistance is regarded outwardly, which means according to objective factors, only a furthering and support of the action of the principal perpetrator; the accessary must have helped to bring about success by his support. 1) If he has not helped to bring about this success, then he is not an accessary. Then his action is not punishable.

Concerning the mental side of the deed, the dolus, the will of the accessary (animus socii) must be directed to the end that somebody else's action is supported with his knowledge. And so when judging what is going on within the mind of a perpetrator, German law also makes a sharp difference between the will and the knowledge.

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1) Reich Court 56, 168: "a condition for the action of another person must be established objectively."

2) See footnote 2) on the following page.

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And this discrimination is furthermore decisive as to whether somebody has given assistance <u>at all</u>.

I have stated before what FRITZSCHE was in any way able to know about plans or the execution of them, from the range of his duties. Only if one had proved that he had a <u>definite</u> knowledge and will as an accessary to the fact could he be condemned. It would have to be further proved in the case of defendant FRITZSCHE whether what <u>he</u> knew and wanted in connection with an alleged furtherance is identical with what any of the main criminals actually did. Only when the knowledge and intent of both agree can one be an accessary at all. In this connection it is to be emphasized than an indefinite knowledge, a very general intent is not sufficient to establish the state of being an accessary. The accomplice must be/aware <u>concretely</u> of the elements in a case which another

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2) If I am not mistaken, this corresponds roughly to the distinction between the act of intent (vicious will) and the ability to distinguish between good and evil (some blameworthy condition of mind) of English legal theory.

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is to carry out in accordance with his intention. 1)

The Prosecution, however, also charges FRITZSCHE in various points with instigating specific crimes as an accessary. And so the third question is: Has FRITZSCHE been the instigator of any single crime?

At the beginning of these legal statements, I have already referred to the details of Captain SPRECHER's prosecuting speech. To me it is doubtful if here the concept of instigation is meant in the legal-dogmatic sense of the common law. The concept of "incitement" is used essentially to the extent that it corresponds to the German

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1) These legal principles have been developed on the basis of Par. 49 of the Reich penal code in many decisions of the High Court of Justice of the Reich; the reproduction of at least one of these decisions seems appropriate to explain the German legal theory. As early as in its decision of 7-10-1890 (RG.21, 95) the High Court of Justice of the Reich formulated the question as follows:
"Because the substance of being punishable as an accesssry lies in knowingly furnishing help in the commission of the perpetrator's offense, it does not only presuppose that the accomplice must have had knowledge of all the essential characteristics of the deed to be committed, but also that his will, his intent, was directed towards supporting and furthering the execution of this specific, concrete deed of the perpetrator by his assistance. The deed that was actually to this extent with that which was knowingly supported by the accomplice in all essential characteristics. If this agreement is lacking, especially should the perpetration use the assistance given him for the execution of another deed or for a more serious deed which for special reasons remained unknown to the accomplice, this cannot be ascribed to the accomplice. His criminal responsibility extends only as far as his intention to furnish assistance goes and finds fulfilment."
Compare to this also the decisions in RG 15, 316; RG. 37, 323; RG. 56, 35

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legal concept of mere invitatio (Aufforderung) [1]. This charge of instigation can only be raised insofar as it can be said to concern the individual responsibility of FRITZSCHE for a specific crime mentioned in Article 6 Paragraph 2a - c. The assumption, that FRITZSCHE was a possible "instigator" to a common plan WITHIN the group of conspirators cannot be substantiated in any case, in accordance with what I have already explained at an earlier time.

Instigation as an accessary form of participation in the general legal sense presupposes, however, quite otherwise than in the case of an accomplice, in which a criminal will is only to be supported or maintained, that such a will must first of all be produced in the perpetrator. The psychological influence, unlike that of the accomplice, does not consist of affirming or strengthening the individual who has already decided to carry out the deed, but in first producing the will for the deed [2]. the means for this can be of the utmost variety, but the perpetrator first must have his mind changed brought around to it [3].

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1) Prosecution on speech of Captain SPRECHER of 23 January 1946, English minutes: pages 3226, 3229, (here, however also in connection with the concept of "instigation"), 3233, 3234.

2) Compare: "accessary before the fact" with the two possibilities, that of the "instigator " who first produces the decision, or that of the "abettor", who gives intellectual assistance before the execution.

3) From a decision of the Supreme Court (Reichsgericht) in RG 36, 404:

" The concept of instigation presupposes that the person who is to be instigated has not already decided by himself to commit a criminal act, either by his own conviction, or by the influence of others".

Compare with this also RG. 26, 362.

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Assistance and instigation accord again as accessorial forms of participation, as in the case of instigation, a conscious and in the case of the instigator a designed causative connection must exist between his instigation and the decision of the perpetrator. The principle of equivalence is valid equally as in the case of assistance. The perpetration of a deed must correspond with the conception and the will of the instigator. The instigator is therefore responsible so far as his intention reaches. A possible excessus mandati cannot be attributed to him. From this follows the accessoryship not only of assistance but also of instigation!

The evidence has not furnished the slightest proof to the FRITZSCHE case that he has committed an individual crime as instigator through his transmission of news. Nothing has been demonstrated that he has instigated a single person to murder, cruelties, deportations, killing of hostages, massacre of Jews or others, or crimes mentioned in the Charter, or had as instigator caused a single crime by his transmission of news. Not a single passage from his nearly 1000 Wireless speeches could be produced from which such a conclusion of individual responsibility could be deduced. It could not happen from public speeches. The crimes which were committed were carried out by people completely indifferent to FRITZSCHE's propaganda. They received their urge or instructions from all together different sources. These deeds were to be kept quite secret. The official

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news service should avoid handling this as much as possible. As this trial has shown particularly impressively, the perpetrators made the greatest effort to inform a very small circle, for example, of the annihilation of the Jews. What is self-evident in every other State Constitution, namely, that occurences in the country should be handled through the press, was not permissible in a dictatorship. The people should not be asked whether they approve such incidents. The crimes established by this trial should not be permitted to be made public. Can one assume that under such circumstances the press and the radio were suitable means to instigate the perpetration of crimes? Is it not more probable that such incidents were kept specially secret from the press and the radio?

In no single case - even if the speeches of FRTIZSCHE were ever so prejudiced - could it be reckoned that through public speeches he could evoke decisions for the perpetration of punishable deeds by a single individual.

Possibly the juridical indications of the Prosecution do not go so far. The Prosecution will reproach FRITZSCHE that he has contributed to produce an "atmosphere of hate".[1]

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1) Prosecution speech of Captain Sprecher: German Transcript: Pages 3152 and 3162; English Transcript pages 3221 and 3239.

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Only through such propaganda was it at all possible for gruesome crimes as these to be committed in Germany. This reproach, however, is legally irrelevant. This charge would have legal importance only if the defendant FRITZSCHE had been among the group of so-called conspirators; if he had been the instigator of a common plan. I believe to have proved that such opinion is impossible. If he had actually brought about an "atmosphere of hate", his instigation of someone else - outside of the group of conspirators - to commit a certain crime would have been impossible legally speaking. Furthermore, according to the provision of the Statute Law of German Penal Code, a summons disseminated by radio would even exclude facts which the letter of the penal code reqires in order to establish the charge of conspiracy. According to German jurisdiction as practived for decades, ther could be no conspiracy, because instigation could not have centered on a certain individual. Furthermore, German Law concerns itself merely with instigation to commit a concrete deed but not with a instigation to commit punishable actions in general. (1) In priciple, therefore,

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1) Compare "Decision of Reichsgericht (German Supreme Court) in RG (Reichsgesetzblatt - Reich Law Gazette) 34, 328: "It is not sufficient to influence someone along the line of criminal thinking, or of direction of will per se, to justify the assumption of punishable instigation. It is adopted practive, therefore, that the concept of instigation does not excut as long as it involves pursuasion of another person to commit criminal deeds in general - even though of a defined category - unless evidence is established that commission of the recent punishable action - which actually occourred, - was in that person's intent who originated the general Summons. Also compare RG (Reichsgesetzblatt - Reich Law Gazette) 26,362.

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a summons of some kind, directed towards a group of persons individually undefined, does not constitute incitement to complicity; it is rather outside the framework of legal relevancy altogether. It is quite self-evident, however, that FRITZSCHE's radio addresses were intended for an entirely unlimited group of persons. Furthermore and since he was seriously striving to find for the German press and radio propaganda a "foundation based on truth", could he have such an aim to incite to culpable actions? My client admitted in an impressive and unequivocal manner that he followed a tendency which was in keeping with the official German policy, when he passed on the news which he was expected to disseminate. In other words, he did not take advantage of the fact that International Law did not place him under any restraint, and nothing in the evidence submitted has refuted his good faith. However, in the light of the law, when it is concerned with incitement to complicity, or with assistance given as an accomplice, good faith is equivalent with lack of will and lack of purposefulness.

This establishes.

1) that the defendant FRITZSCHE did not belong to the group of conspirators who planned,
2) that he was never at any time a member of a group or an organization which it is here proposed to term criminal;
3) that, factually and for legal reasons, he is not individually guilty of a

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war crime or a crime against humanity, neither as an accomplice nor according to the letter of law - as an instigator, and not even - also according to the letter of the law - as accomplice. This will suffice, I believe, for my discussion of the question of evidence and legal conclusions. It is necessary though to mention one other thing: The Fritzsche case has also its human aspect.

Apart from the pros and cons or legal potentialities, another closely related question suggests itself, which must not remain without answer: Taking Fritzsche strictly as a human being, can he be expected to have had knowledge, to have been co-originator of all the monstrosities which were established in this Court? According to the interpretation of the Prosecution, a dolose instrument is (1) the conspirator - of whom Goebbels was perhaps one - : he only who had knowledge of its aims and purposes.

Fritzsche's measures and utterances, however, were not dictated by criminal will. During his examination before this High Tribunal, Fritzsche pointed to the fact that he does not convoke his duty to obey. But he added that as far as his own person is concerned a criminal proposition was never made to him. And he furthermore declared: There was no compulsion for anybody to carry out an order in which he could not help seeing the intended crime. Undoubtely, Fritzsche sacrificed his own convictions and had to have recourse to many a compromise. This, however, he

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(1) Indictment: Count One, IV, A.

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did not do where he thought he discovered injustice, violence and inhumanity. As is fitting to a journalist, he examined with care whatever reports reached him from abroad. In disregard to inherent dangers for his own person, he traced the news which concerned Germany itself, dangers which ambushed every person who tried to penetrate that which absolute secrecy intended to hide. He did not permit himself to be put off with paltry, vague explanations. He reported many details. I merely refer to his visits to GLUECKS, HEYDRICH and his investigations in the Ukraine.

To the extent that he discovered criminal purposes - such as the "Kommissarbefehl" and the plan to revenge inhumanely the air bombardments on Dresden, he fought against them with determination, in the latter case even with the help of a foreign Ambassador. And he was successful, too, as these two particularly conspicuous examples show. He did this because he followed the voice of his conscience. He did not first engage in lengthy deliberations as to the pros and cons. As regards the "Kommissarbefehl" he merely had heard of it as a soldier - he had never read it, nor did he know that it actually was carried into practice at any time - and he at once raised a protest. When GOEBBELS ordered him to announce the proposed killing of great numbers of allied fliers he did not mind incurring the anger and the fury of his Minister. Dr. SCHARPING described this in

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detail.(1) When he learned of cruelties in the concentration camp at Oranienburg, he even sounded an alarm. The culprits were punished immediately, at that time. Dr. SCHARPING's affidavits(2) which I submitted, and others prove his implicit willingness to assist those who were persecute for political or racial reasons if they applied to him. Most nevealing is the tolerance with which he made the continued publication of the "Frankfurter Zeitung" possible.(3) Other proofs along that line which are also submitted with my Document Book II are not negligible, and in the case of FRITZSCHE certainly cannot simply be passed over with the comment that with his other hand he "cold-bloodedly"(4) abandoned others to death.

He was not willing to sacrifice his dignity as a human being, not even to the seeming demands of what paraded as idealism, or for the sake of an oath he had taken.

While the Prosecution has tried to darken the picture , I can also point to brighter spots, namely those which have bearing on him as the representative of propaganda.

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1) Affidavit of Dr. SCHERPING of 17 May 1946
FRITZSCHE Exhibit 3, document book II, pages 16 to 19.

2) Affidavit of Dr. SCHARPING of 17 May 1946,
FRITZSCHE Exhibit No. 2, document book II, pages 6 to 15

3) Affidavit Dr. HECHT of 6 March 1946.
FRITZSCHE Exhibit 5, document book II, page 22.

4) Captain SPRECHER, Prosecution address of 23 January 1946; German transcript of Court Proceedings, page 3163; English transcript, page 32

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Was he a liar - and even perhaps a notorious liar? That Goebbels was one is made clear by the revelations of this Trial. And as it was wrongly assumed that Fritzsche was his right-hand man, the implication was of course that Fritzsche had the same attributes. The assumption may be clearly refuted. It is my conviction that, had not Goebbels sought evasion of responsibility in death, we should not now see Fritzsche in the prisoners' dock here as representative of the Propaganda Ministry. The further assumption that all collaborators of Goebbels must have been wittingly at the service of his lies is unjustified. It would only be justified if it had been established here that Fritzsche was in a position to grasp everything including the real and most deep-lying connections. But that could only be determined in this Trial. Fritzsche remained entangled in error like millions of other Germans. Glaring abuses were to be seen everywhere. Fritzsche was not unaware of them. Indeed, he has declined to be characterized before this Tribunal as an opponent of Nazism. He has, however, claimed to have opposed abuses in so far as he could recognise them. This entitles him to be put on a better moral plane.

Neither was he a zealot or a fanatic, possessed only by the idea or adoration of power and success and inaccessible to criticism. Of course it was a sin, indeed the grievous sin against the spirit, to have served the system.

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The decisive point is, however, whether he was in a position to detect more than mere abuses. Falsehood nevertheless was already built into the foundation and anything built upon that was bound to be untruthful. It was not only the "thousand door Ministry", as it was once called, that was poisoned. The real reason why everything in Germany was poisoned by falsehood could best be detected by those who lived in a purer atmosphere.

FRITZSCHE did not even keep immune from the phraseology, but he used it perhaps with better taste than many others. He had occasion to claim here - and this is no mere empty phrase - that he has always acted fairly and honorably in every respect in his professional work. Dr. SCHARPING too has emphasized this in his affidavit. Is this not an indication that he really did not detect that the whole foundation upon which his work was built up was hollow and deceptive? Had he been a professional liar, he would not have made a point of doing fine and honest work, that of checking foreign reports and of seeking, in everything that affected him, a truthful basis for the press and radio.

The Prosecution has laid stress upon his rise in the Propaganda Ministry. Did they mean to imply thereby that he was particularly qualified as a liar? Actually, his career - however modest it was really compared to that of HITLER's other auxiliaries - has quite another foundation which has also been clearly stated here.

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He only made headway because he was qualified as a journalist and technician; not because he was particularly good at lying but because he talked better than many others.

As proved by the affidavits of Dr.Scharping and Frau Krueger (1) Fritzsche lived on a modest scale. During his activity at the Propaganda Ministry he has gathered no riches, possessed no luxurious dwelling and neither asked nor received any gift. Indeed, the Prosecution has made no assertion to the contrary. It therefore does not appear astonishing that those who not only heard his voice on the Radio but also knew him personally should have particularly emphasized his human qualities. Dr.Scharping declares in his affidavit: It was a distinction to be allowed to work with him. Is it in keeping with human experience that an impostor should win such consideration? I believe human esteem can only be won by an honest character. Those who are in daily intercourse with a person can find out whether he is a liar or not. And if his speech does not betray him, then his eyes will.

There may be many possibilities of contradicting that somebody who has cooperated in the propaganda of the Third Reich is nevertheless honest and a lover of Truth. The most immediate explanation is probably that which can be taken from Fritzsche's own remark which I repeat here:

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1) Affidavit Marta Krueger dated 15 June 1946, Fritzsche Exhibit 8.

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He said he felt - and this may well be significant for the verdict if not for History - that he was deceived by HITLER too!

Before this Tribunal, FRITZSCHE has not only defended himself but the German people as well. To what extent he is himself responsible to the German people for his persistent and ultimate exhortation to carry on the war to the very end is not a matter to be decided here.

It may be that FRITZSCHE did not, like others, realize that he was serving an evil cause, or it may be that he did not turn from the State leadership for the sole reason that he wished to share the cup of bitterness with the German Nation to the last dregs. But guilty in the sense of the accusation brought against him before the Tribunal he is not. I request his acquittal.